No. 12,675

IN THE

United States Court of Appeals

For the Ninth Circuit

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Appellant,

vs.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division.

BRIEF FOR APPELLEES.

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Upon Appeal from the District Court for the Territory of Alaska, Fourth Division.

BRIEF FOR APPELLEES.

JURISDICTION.

This is a suit to enjoin the appellant from enforcing the provisions of the Alaska Property Tax Act, Chapter 10, Session Laws of Alaska, 1949, as amended, and to have declared invalid the Act in its entirety. Judgment and decree was entered on August 1, 1950, declaring the Act invalid in its entirety, with the exception of the amendment thereto contained in Chapter 88, Session Laws of Alaska, 1949, and

granting a permanent injunction. (R. 89-92.) An appeal was taken on August 7, 1950, by filing with the District Court a notice of appeal. (R. 88.) The jurisdiction of the District Court was invoked under the Act of June 6, 1900, c. 786, Secs. 4, 31 Stat. 322, as amended, 48 USCA Sec. 101. The jurisdiction of this Court rests on Sec. 1291 of the New Federal Judicial Code.

QUESTIONS PRESENTED.

1. Whether Chapter 10, Session Laws of Alaska, 1949, known as the Alaska Property Tax Act, is a valid exercise of the taxing authority of the Territory of Alaska.

2. Whether an injunction should have been issued enjoining the enforcement of the provisions of the Alaska Property Tax Act.

STATEMENT.

The appellant, in his brief, has set forth, commencing on page 2, a statement of the action brought in the District Court for the Fourth Judicial Division of Alaska, and the various steps which were taken in the case which resulted in a judgment for the appellees and the issuance of a permanent injunction enjoining the appellant from enforcing the provisions of what is known as the Alaska Property Tax Law contained in Chapter 10, Session Laws of

Alaska, 1949, as amended by Chapter 88 of the Session Laws of the same year, a copy of which law is set forth as Appendix A, commencing at page 43 of appellant's brief. We believe that the statement of the case, to be complete, must point out the pertinent sections of Chapter 10, Laws of Alaska 1949, and the several grounds of invalidity urged by appellees at the trial.

The Alaska Property Tax Act, a copy of which is found in the appendix to appellant's brief, purports to levy a tax of 10 mills on all real and personal property within the Territory, commencing with the calender year 1949, at the true and full value of the property, excepting as to unimproved, unpatented mining claims which are not producing, and non-producing patented mining claims upon which the improvements required for patent have become useless through deterioration, removal or otherwise, the value is fixed at $500.00 per each 20 acres or fraction of each such claim. The tax on boats and vessels used on a commercial basis is levied on the basis of either the value of the boat or vessel or at the rate of $4.00 per net ton registered tonnage, and the owner may elect to choose between these two methods of valuation.

Section 4 of the Act provides that the tax levied under the provisions of Section 3 upon property within the limits of any incorporated city or town, independent school district or incorporated school district, shall be assessed, collected and enforced in the manner prescribed by the Property Tax Law

of the municipality or district by and at the expense of the municipality and district, and such tax levied within the limits of municipalities or school districts shall be retained by the municipalities and districts. In other words, the tax within those municipalities and districts is assessed, collected, enforced and proceeds thereof retained by the municipalities and districts.

The tax collected under the law on property within a public utility district is handled in the same manner.

Under the provisions of Section 5, all taxes collected on property outside of municipalities, school districts and public utility districts is to be transmitted to the tax commissioner and covered into the general fund of the Territory.

Section 6 provides certain exemptions of property from taxation. These exemptions, it will be seen hereafter, are not the same as the exemptions allowed by the laws of the Territory to property within municipalities and school districts.

Section 7 fixes the date of returns to be made by the taxpayers to the tax commissioner. This date is July 15 in the year 1949 and March 15 each year thereafter, and the property is to be valued by its owners as of January 1st of the year in which the return is made.

Section 11 provides that property shall be assessed at its full and true value in money as of January 1st of the assessment year. This section also pro-

vides that the assessor shall value the properties at such sum as he believes the same to be fairly worth in money at the time of assessment. Then the last sentence of Section 11 provides that the true value of property shall be that value at which the property would generally be taken in payment of a just debt from a solvent debtor.

Sections 12, 13 and 14 provide for the assessment of property in the Territory outside of municipalities, school districts and public utility districts.

Section 15 provides for assessment notices and Section 16 for the preparation of an annual assessment roll.

Then there are various sections relating to the assessment rolls and the records of the boards, and notices of hearings and appeals to the board from the action of the assessor, hearings on the appeals to the several divisional boards, and from the boards to the Court, and the time of payment, etc.

Section 34 provides that the taxes, together with interest and penalty, are a lien upon the property assessed from and after the assessment until paid.

Section 35 provides for the payment of interest not exceeding the legal rate of interest, which, in Alaska, is 6% per annum.

Section 42 provides for the foreclosure of unpaid liens.

Section 43 sets up boards of assessment and equalization. There is one board for each judicial divi-

sion and these boards are empowered to hold hearings and conduct investigations in connection with administration and the assessment provisions of the act. It will be noted, however, that these boards are divisional boards. That is to say, there is one separate board set up for each judicial division of the Territory, and there is no common or general or territorial board. In other words, there is no connection between the several boards of assessment and equalization and no general board of equalization to equalize the value of property situated in the several judicial divisions nor to equalize values within incorporated cities, school districts and public utility districts with values of similar property outside those districts.

Municipalities and school districts in Alaska have had the power to tax property within their boundaries for many years, and that power exists as it has for the past 25 years or more with a few changes, the chief one of which is that the limit of their taxing power for municipal purposes has been increased from 2% to 3% by Congress.

The cities levy a general tax on all real and personal property for school and municipal purposes, and the school districts levy a tax on all property within their confines for school purposes. The city tax goes for general municipal purposes, such as street improvements, fire protection, public health, sewers, public buildings, and a part for schools.

The taxes levied by municipalities and school districts are, under the laws of the Territory, levied,

assessed, equalized, collected and enforced in accordance with municipal ordinances. These ordinances provide the dates of assessment, the dates when taxes become due and delinquent, rates of penalty and interest on delinquency, provisions for equalization and for a hearing in Court in case of dispute over values, and lien provisions and provisions for the sale of property for delinquent taxes and the redemption thereof by the owner.

The city ordinances in the Territory providing for the levy, assessment, collection and enforcement of taxes in the several municipalities are nearly all different. They are different as to dates, time of payment, rate of penalty and of interest, etc. This is also true with reference to school districts. Some of the cities, notably Juneau and Douglas, which are involved in this case, provide for a discount for the payment of taxes on or before a certain date. Other cities provide for no such discount.

The plaintiff and intervenor contended that Chapter 10 of the Session Laws of Alaska, 1949, as amended by Chapter 88, was void for the following reasons:

(1) It is violative of the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States;

(2) It sets up a system of taxation which is not uniform and therefore is in violation of Section 9 of the Organic Act;

(3) The terms and provisions of the Act and the amendment thereto are vague, uncertain, indefinite and impossible of reconciliation and in some instances inconsistent with each other;

(4) There is no adequate provision in the statutes of the Territory for the recovery of the tax, if paid, and the law is thereafter held to be invalid;

(5) There is no overall or territorial board of equalization and therefore a taxpayer has no means of ascertaining through any administrative step which he can take whether the tax levied upon his property is excessive or whether the values are the same on his property as on property of the same nature and value which might be situated in another judicial division;

(6) The part of the tax collected by municipalities, school and public utility districts is to be used for local, municipal or district purposes in which the territory outside of such municipalities and districts derives no benefit;

(7) The part of the tax collected by the Territory is to be used for territorial purposes in which the municipalities and school districts and the inhabitants thereof benefit to the same extent as the residents of areas outside those municipalities and districts, thereby giving a preference to the municipalities and districts as against the outside areas;

(8) The dates for assessment, valuation returns, payment and the attachment of liens may vary as between the several groups and individual members of

groups of taxing districts, thereby giving different results;

(9) The lien arising against real property within cities and school districts upon which taxes have not been paid is enforced in one manner while a similar lien arising against property outside of those taxing units is enforced in an entirely different manner and in the one case a two-year period of redemption is provided where property is sold for unpaid taxes, while in the Territory outside of those districts no period of redemption whatsoever is allowed;

(10) There are different criteria for valuation of mining property and boats as against other property;

(11) There are substantial variations as to exemptions between the different types of taxing districts;

(12) There is no method provided in Chapter 10 or in any other law for equalization of assessments as between different municipalities or districts or between any of these and the outside areas or of assessments in outside areas in the different judicial divisions;

(13) There is no uniform system of assessment appeals;

(14) There are substantial differences in the personal liability of taxpayers depending upon the taxing unit in which their property is situated;

(15) There are substantial differences in the penalties and interest charges to which different tax-

payers are liable, depending upon their taxing district (this will appear by an examination of the various city ordinances introduced and a comparison of the penalties and interest charges therein contained with those contained in the territorial tax law). (R. pp. 96 to 122.)

(16) Uniformity as required under the law is wholly lacking and the provisions of Section 4 of the Act actually exempt from the tax all property situated within municipalities and school and public utility districts by permitting them to assess and collect the tax in their own way, at their own rates, under their own ordinances and retain it, or to decline to assess or collect any portion of it.

The District Court for the Fourth Judicial Division of Alaska, held the Alaska property tax law to be invalid, after having made and filed its findings and conclusions, and it entered judgment and decree on August 8, 1950, enjoining the defendant from enforcing it. (R. 89 to 92, inclusive.)

ARGUMENT.

We shall endeavor to answer the argument contained in appellant's brief in the order in which it is presented.

I. IS THE ALASKA PROPERTY TAX ACT A VALID ACT AND DOES IT CONTRAVENE THE UNIFORMITY CLAUSE OF SECTION 9 OF THE ALASKA ORGANIC ACT AS AMENDED? (62 Stat. 302: 48 USCA Sec. 78.)

A. Are the standards of equality and uniformity demanded in Section 9 of the Organic Act and the Fourteenth Amendment fulfilled whether they are the same or not?

Section 9 of the Alaska Organic Act, a copy of which is found in Appendix B on page 63 of appellant's brief, reads as follows:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the true and full value thereof, except that unpatented mining claims and nonproducing patented mining claims, which are also unimproved, may be valued at the price paid the United States therefor, or at a flat rate fixed by the legislature, but if the surface ground is used for other than mining purposes, and has a separate and independent value for such other purposes, or if there are improvements or machinery or other property thereon of such a character as to be deemed a part of the realty, then the same shall be taxed according to the true and full value thereof."

The Fourteenth Amendment to the Constitution of the United States provides:

> "No state shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

Counsel cites, on pages 12 to 16 of his brief, a number of decisions of this Court and the United

State Supreme Court with reference to uniformity required in license and excise tax cases, but in none of these cases do we find the Courts upholding a law similar to the Alaska Property Tax Act, where most of the taxable property in the Territory, i.e., that situated within municipalities and school and public utility districts, is exempted.

The cases cited deal with classification of property where all taxpayers are treated alike. A typical case is that of *Madden v. Kentucky,* 309 U.S. p. 83. In that case, the law of Kentucky provided for a tax on bank deposits, and the tax on deposits of all residents of Kentucky was at one rate for deposits situated within the state and at a higher rate for deposits situated elsewhere. The Court held that the Fourteenth Amendment was not violated by this law, but it will be observed that all citizens of Kentucky were treated alike and all bank deposits were treated alike. That is to say, those within the state were all taxed at one rate, and those outside the state all at another rate. Thus no question of discrimination as to property wholly within the state is involved. The decision does not state just what the Constitution of Kentucky provided. But in Alaska we have the Organic Act, and what becomes of the provisions of Section 9 under a law such as the Alaska Property Tax Act? Surely the uniformity provision is violated. If a Kentucky tax had been upheld by the Supreme Court in the face of a Constitution which provided that all taxes should be uniform upon the same class of subjects and this law levied one rate

in the city of Frankfort under one set of rules and laws and another tax in the hill country, then it might be in point, but we think it is not applicable here.

The Alaska law was designed to exempt from the tax all property within municipalities and school districts. While it is true that the tax is purported to be levied on all property everywhere in all taxing districts, a virtual exemption is sanctioned by allowing the cities and school and public utility districts to assess, collect and enforce the tax under entirely different ordinances and laws, at different rates and to retain it if it is collected at all, or to refuse to assess or collect any portion of it, as the record shows was the case in the municipalities of Juneau, Fairbanks and Douglas and in the Douglas and Fairbanks school districts in this case. (Finding No. 3, R. 78.) There do not appear to be any Court decisions which hold that such a law meets the requirements of either the Fourteenth Amendment or of the Alaska Organic Act, or any State Constitution containing similar provisions.

The Alaska Property Tax Act in effect simply levies a tax of 10 mills on all property outside municipalities, school districts and public utility districts for Territorial purposes under certain terms and conditions, and provides for its assessment, collection and enforcement under procedure set up in the Act, and it then permits the cities, school and public utility districts to simply increase their own taxes, not exceeding 10 mills, in their own way, ac-

cording to their own ordinances, with all the differences they contain from the Territorial tax as to valuations, assessments, dates for payments, discounts, equalization, enforcement, interest, penalties, exemptions, personal liability, liens, redemptions from sale, etc. (See R. 96 to 122, inclusive.)

Classification of property for taxation, if the classification has a reasonable basis and is not arbitrary, is one thing, but exemption from taxation whether directly provided in so many words or appearing upon the face of the statute as a whole and from its operation, as is the case in Alaska, is something quite different and does not appear to square with either the uniformity provision of the Organic Act or with the equal protection clause of the Fourteenth Amendment.

B. Has the Legislature adopted a broad classification in the Act which sets standards of equality and uniformity?

The record in this case shows that there was no classification of property under the Alaska law, and certainly none such as was involved in the case of *Madden v. Kentucky,* cited by appellant, but there was made two wholly different systems of taxation applying to different parts of the Territory or different taxing districts, and having no uniformity in any respect, as we have pointed out hereinabove. But appellant, after having argued that these two wholly different systems of taxation, under different laws and many different ordinances are really classification of property, proceeds next to advance a theory, not supported anywhere in the law, for this so-called

classification. Briefly, the theory is that within municipalities the Territory, before the passage of the Act in question, contributed from 75% to 85% of the expenses of the schools, depending upon the school enrollment, in the various cities and school districts, while paying the entire expenses of the rural schools outside of municipalities and school districts (R. 144 and 145); that because the property owners in cities were required to pay from 15% to 25% of the expenses of their schools, the legislature properly accorded them the tax exemption which is provided in the Alaska Property Tax Act so that property outside of cities and school districts should pay the tax into the Territorial treasury while taxpayers owning property within cities and school districts should be relieved of the tax, or if levied under their own laws, be permitted to keep it.

This is wholly a theory of appellant. There is nothing in the law to even hint that such was the intent of the Legislature and there is no such declaration of policy. Let us see how that would work. The record shows that within the City of Fairbanks the total taxable property in the year 1949 was $16,060,624.00, and in the Fairbanks school district outside of the City of Fairbanks the assessed value for the year 1949 was $13,532,279.00. This makes a total of $29,592,903.00. (R. 136 and 137.) A Territorial tax levied on that at 1% would amount to $295,929.03. The entire school budget of the Fairbanks school district, i.e., the district which includes the city and the outlying area contained in the district, for 1949

and 1950 shows $210,575.50. (R. 136.) Thus if the Fairbanks school district, which includes the City of Fairbanks, should use the Territorial property tax of 1% as an offset against the entire expense of its schools it would be receiving $295,929.03 as against an expenditure of $210,575.50, and this would result in a profit or advantage to the school district of $85,-354.53. But that is not all, for the law of the Territory, which provides that the Territorial treasury shall pay three-fourths of the cost of schools within the Fairbanks school district, was not changed, so that the city would have over $295,000.00 additional tax money under the Alaska Property Tax Law to offset not $210,575.50, but against only one-fourth of that, as that is the only portion the cities and school districts pay toward the expense of their schools. The advantage to the Fairbanks school district, therefore, would be over $241,000.00 instead of $85,354.53. It would certainly seem that if any such theory had been in contemplation of the Legislature when the law was passed, the members would certainly have at least adjusted the matter of payment of school expenses, and instead of paying three-fourths of that expense they would have allowed the cities and school districts, with the vastly increased revenues which would be available, to pay all their own school expenses. Even this would have given the Fairbanks school district, for instance, a greater advantage over the rural areas, and the same would hold true for all other municipalities and school districts.

Mr. William K. Liese, tax assessor for the Fourth Judicial Division, testified that the value of all property in the Fourth Division, outside of incorporated cities and school districts, listed to the date of May 15, 1950, 16½ months after the levy of the tax took effect, was only $11,380,798.30, or a little more than one-third of the property in the Fairbanks school district alone. (R. 162.) It will be seen, therefore, that by far the greater part of the taxable property in the Territory is within cities and school districts, and therefore subject to escape the Alaska property tax, which is levied on property outside cities and school districts.

It has been thought necessary to suggest that another reason for the so-called classification, or what we maintain is an exemption, is that those who own property outside of municipalities and school districts have heretofore escaped taxation while those within the cities and school districts have paid taxes for school and municipal purposes within those districts. This is not so. In the first place, the munipical taxes and the school taxes are expended entirely for school and municipal purposes, including streets, sewers, fire protection, public buildings, sanitation, and scores of other things which are not available to those in the rural areas, and secondly, property in the rural areas has heretofore provided the greater bulk of the Territorial revenue through license, excise and other taxes, and these go not only to support the small rural schools, but to pay an average of from 75% to 85% of the cost of the city and dis-

trict schools in addition to other governmental expenses. The Court will take judicial notice of the fact that the fisheries and mines are the chief contributors to the revenue of the Territory and they have been for many years, and they have paid and are paying now, heavy taxes. Practically all their property is situated in rural areas outside of incorporated cities and towns, and a very small portion of the Territorial revenues has been contributed from within municipalities and school districts. Thus it appears that appellant's entire argument on this point has been based on his premise that the Alaska legislature, prior to 1949, had legislated so that an inequality or discrimination existed against the taxpayer in the cities and school districts. And, assuming that such discrimination existed, appellant seeks to justify his position by assuming further that the Legislature now intended to reverse the situation and to require rural taxpayers to pay the full 1% tax to the Territorial tax commissioner, while the taxpayer in the cities and school districts may do what their own consciences dictate in the matter of imposing the tax or collecting it. There is nothing in the record to support appellant's assumption or the argument based thereon.

C. **Does the fact that the property tax ordinances of the various municipalities and school district differ invalidate the Act?**

Appellant begins his discussion of this portion of his argument by adopting the fallacious premise that the Legislature has used a legitimate broad power of classification to more equitably distribute the cost

of government between the two classes of taxpayers, i.e., those owning property in rural areas and those owning property in cities and school districts. He then states that the differing provisions of the several tax ordinances of the cities and school districts can have no bearing upon the legislation because the Legislature, having the power to classify can also adopt sub-classification. He fails to point out wherein we have, in this case, a rational basis for either classification or sub-classification, or to discuss the difference between classification and exemption.

We do not contend that the substantial differences in the tax ordinances of the various municipalities and school districts, which are all set up according to law, alone invalidate the Act. But we do contend that the Act lacks uniformity because it applies one standard of values, one method of assessment and collection and enforcement, to property outside of cities and school districts while leaving it to the municipal and school district authorities to either assess, collect and enforce the same tax at a different rate and in a different manner and retain it for their own purposes, thereby setting up several different standards and different procedures within the various municipalities and school districts, or to ignore it altogether, as was the case in the cities of Fairbanks, Douglas and Juneau and the Fairbanks and Douglas school districts in 1949. (R. 78 and 79.)

Municipal and school district taxes are levied for general municipal and school purposes (ACLA Secs. 16-1-35, 9th Sub.; 16-1-111 and ACLA 37-3-23.)

The Alaska Organic Act originally limited municipal taxes to 20 mills. Congress in 1948 amended the Act by increasing the limit to 30 mills. (R. 56.)

We think it sufficient to say that with all the differences in the municipal and school district ordinances, even if the 10 mill tax levied by the Alaska Property Tax Act were provided to be actually collected by the cities and school and public utility districts and covered into the Territorial treasury for general Territorial purposes, still, if assessed, collected and enforced in accordance with the widely differing provisions of the local ordinances, the tax would lack uniformity and no question of justification on the ground of classification could possibly arise. We have here no device for "distributing the cost of government among those who enjoy its benefits", which would justify any classification, much less an exemption of by far the great portion of all the property in the Territory.

The Alaska Property Tax Act is another example of hastily conceived and hurriedly enacted legislation. It is apparent on the face of the law that it was intended to exempt all property in cities and school and public utility districts because the entire assessment, collection, enforcement and disposition of taxes within those taxing units is left to the local authorities under their own laws, and the Act gives the Territory no control and no power to interfere if they ignore the law and refuse to assess any Territorial tax at all, as was the case in the five municipalities and school districts involved in this case.

If appellant's theory is correct, or even partially correct, and the Legislature had in view the object of favoring municipalities and school districts, it no doubt could have passed a general uniform law as required by the Organic Act, providing for the levy, assessment and collection of a tax on all property, wherever situated in the Territory, and then adjusted the school expenses by assuming the entire cost and expense of schools within cities and school districts, including the cost of repairs and additions to school buildings.

D. Have appellees been the victims of unconstitutional discrimination?

It is contended that since the appellees paid the taxes levied by the cities of Juneau, Fairbanks and Douglas and the Fairbanks, Juneau and Douglas school districts, and those taxes were the same as though the Alaska Property Tax Act had not been passed, i.e., the municipal and school district taxes, they may not now be heard to complain that the property taxes in the Territory levied by the Act, under attack, are not uniform.

It is difficult to see how this could be. Taxes were demanded of the appellees on property outside cities and school districts, while under the same law similar property of others which might be situated within a city or school district was not taxed, but, in effect, exempted.

We are not complaining of lack of uniformity in the various cities and school districts as between

themselves. That is permitted under the municipal and school district law. Our complaint is that the taxes sought to be enjoined are demanded to be paid by appellees on certain property, while similar property of others escapes taxation because of geographical location.

The Wisconsin case of *Welch v. Henry,* 305 U.S. p. 134, cited by appellant, is not in point, for there all taxpayers in the same class were treated alike. An income tax was involved. Thus no question of geographical exemption. It was a general tax and all the proceeds were paid into the State treasury.

E. Do the provisions of Section 11 of the Property Tax Act comply with the requirements of the Organic Act?

The Organic Act referred to hereinabove, in Section 9 as amended, provides that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to true and full value", etc., with the exception of mining claims, which are treated differently.

Section 11 says that the assessor "shall value the property at such sum as he believes the same to be fairly worth in money at the time of assessment", and again it defines true value as "that value at which the property would generally be taken in payment of a just debt from a solvent debtor".

This establishes, at best, conflicting standards of value, neither of which is based on true and full value. In the one instance it is left to the whim of

the assessor and there is no uniformity and no standard. There are four assessors in the four judicial divisions independent of each other, with no connecting link between them and no central equalization board. One assessor might be an optimist and another a pessimist, and the results might be widely different. In the other instance, where a standard of value is attempted to be defined, we might have a solvent debtor owning, let us say, an inoperative cannery. He might owe some man $50,000.00, who would say to him: "I shall agree to take the cannery at $50,000.00 in satisfaction of the debt". The offerer might be someone who knew nothing about canneries but who intended to dismantle the plant and sell the machinery and lumber. At the same time, someone else who was experienced in operating canneries, but not a creditor, might be willing to pay $100,000.00 for the property, to be used for canning purposes.

The Court below found this provision of the law to be in conflict with the Organic Act. (R. 85.)

II. ARE THE PROVISIONS FOR THE TAXATION OF MINING CLAIMS IN ACCORDANCE WITH THE AMENDMENT TO THE ORGANIC ACT OF JUNE 3, 1948? (Appendix B, page 63 of Appellant's Brief.)

The Act of Congress of June 3, 1948 (62 Stat. 302, 48 USCA Sec. 78) gives the Legislature the power to value unpatented mining claims and non-producing patented mining claims which are also

unimproved, at the price paid the United States therefor, or at a flat rate fixed by the Legislature, etc.

The Property Tax Act values these claims at "$500.00 per each 20 acres or fraction of each such claim". We grant appellant's suggestion that it is very difficult, if not impossible, to ascertain the true and full value of a non-producing and undeveloped mining claim, and that it was proper for Congress to permit the Legislature of Alaska to value these claims for the purpose of taxation at a flat rate. However, we contend that $500.00 per each 20 acres or fraction of each such claim, is not at a flat rate.

The District Court, in its opinion, calls attention to the definition of the word "flat" as being "absolute; unvarying; exact; even". This definition is taken from Webster's International Dictionary, Second Edition. (R. 51.) The method provided in the Property Tax Act for taxing these mining claims is neither at so much a claim, which would be a flat rate, or so much per acre, which might be a flat rate. A full-sized lode mining claim contains 20.611 acres. The value placed on that claim by the law is not on an acreage basis, nor is it on a claim basis. Here again we find an example of haste in the passage of the law, and we cannot see how it can be remedied by judicial interpretation. If one had a claim of exactly 10 acres it might be contended that the value should be $250.00, which is at the rate of $500.00 for each 20 acres, although the law does not read "at the rate" of $500.00 per each 20 acres. But if one has a claim of 20.5 acres, it is impossible to know at

what rate it is to be valued. We have $500.00 for the first 20 acres, but what would be the value placed on the remaining .5 acres? Would it be another $500.00 or would it be $25.00? Anyway you take it, it is not uniform, and the same Act of Congress which permits taxation of mining claims at a flat rate also provides that all taxes shall be uniform upon the same class of subjects. Many mining claims are full-size lode claims or full-size placer claims, and many others are what is known as fractional claims, which might consist of anything from a fraction of one acre to 20 acres. The best that can be said for this provision is that it is so ambiguous as to be unenforcible, and how any portion of it can be disregarded for the purpose of interpretation it is difficult to see.

Counsel suggests that the words "or fraction of each such claim" are ambiguous and that they may be stricken out by the Court under the severability provision of the Act. However, let us see where that would leave us. The law would then read "$500.00 per each 20 acres" but what about a smaller area, say of two or three acres? If 20 acres is used as a unit, what becomes of a claim smaller than 20 acres? What did the Legislature intend? It is impossible, from the language of the Act, to ascertain just what they did intend. The Legislature had the power to value claims at a flat rate, and when so valued the tax applied must still be uniform. Congress must have meant that the Legislature could value mining claims at either so much per acre or so much per

claim, and the Legislature has, in its haste, failed to heed the provision of the amendment to the Organic Act.

The cases cited by counsel on pages 33 and 34 of his brief are authority for applying the modern rule of severability and nothing more. We can agree with these authorities, but we cannot see how the rule of severability can be applied in this case, where it is impossible to find the legislative intent from the language of the statute, and where the Court, in order to correct the mistake, would be required, in effect, to set up a wholly new rate of taxation of mining claims. There is actually no ambiguity in the language used in the Act, the pertinent part of which is "$500.00 for each 20 acres or fraction of each such claim". There is nothing for the Court to construe. The language means that the value shall be $500.00 for each 20-acre claim and $500.00 for a fraction of such claim, no matter how small. We submit that such a basis of valuation is arbitrary and unenforceable and by no means on the basis of a "flat rate".

III. DOES A COURT OF EQUITY HAVE JURISDICTION TO ENJOIN THE ENFORCEMENT OF THE TAX UNDER THE PLEADINGS AND EVIDENCE IN THIS CASE?

We grant that a Court of Equity has no jurisdiction in such cases if there is an adequate remedy at law. The appellees, in their complaints, alleged: (1) That they had no adequate remedy at law; (2) that they would suffer irreparable injury unless the de-

fendant were enjoined; (3) that the law created a cloud upon the title of their property which could be removed only by a Court of Equity; (4) equitable jurisdiction was necessary to prevent a multiplicity of actions. The proof abundantly supported all of these allegations:

(1) There is no remedy at law.

There is no remedy at law unless the remedy is certain and complete. The Supreme Court of the United States has uniformly followed this rule. *Hynes v. Grimes Packing Company and others,* 93 U.S. Law Edition 964; *Hillsborough Township v. Cromwell,* 326 U.S. 620; *Raymond v. Chicago Union T Company,* 207 U.S. 20; *Southern California Telephone Company v. Hopkins,* 275 U.S. page 393; 13 F. (2d) pp. 814 and 815. In the case of *Terrace v. Thompson,* 263 U.S. 197, it is stated:

> "The unconstitutionality of a State law is not of itself ground for equitable relief in the Courts of the United States. That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical and efficient as equity could afford."

The Supreme Court of the United States has very recently stated the rule in *Hynes v. Grimes Packing Company* and others, supra, as follows:

> "If respondents show that they are without an adequate remedy at law and will suffer irreparable injury unless the enforcement of the alleged

invalid regulation is restrained, a civil court will enjoin."

The only Alaska statute authorizing the refund of taxes paid under protest is that found in A.C.L.A. Sec. 48-7-1(a). That statute reads:

"(a) (Tax Paid under Protest.) Whenever any taxes shall have been paid to the Tax Commissioner under protest and such taxes shall have been covered into the treasury, and the taxpayer or taxpayers involved have recovered judgment against the Tax Commissioner for the return of such tax, or where, in the absence of such judgment it shall become obvious to the Tax Commissioner, that such taxpayer would obtain judgment against the Tax Commissioner for recovery of such tax if legal proceedings therefor were prosecuted by him, it shall be the duty of the Tax Commissioner, if approved by the Attorney General and the Treasurer, to issue a voucher against the general fund of the Territory for the amount of such tax in favor of such taxpayer."

This statute does not constitute any remedy to one who might pay the Alaska property taxes under protest. It will be noted that the remedy in this section is discretionary, and it provides only for the issuance of a voucher against the general fund of the Territory if this is approved by the attorney general and the treasurer. The duty imposed upon the tax commissioner under this section is only to issue a voucher if and when the attorney general and the treasurer might be pleased to approve its issuance.

The District Court found that this statute would not afford any remedy at law to the appellees. (R. 69.) Even if this statute constituted a remedy at law it would not apply to taxes paid in accordance with Chapter 10 of the Session Laws of 1949 within municipalities, school and public utility districts, for as to all these there is no provision in the law applicable thereto which permits the payment of taxes under protest, or recovery under any circumstances.

Again, if this statute were mandatory and required the tax assessor to refund taxes paid under protest under an invalid law, still since there is no provision for the payment of interest, the statute cited hereinabove would not constitute an adequate remedy at law because no interest is provided. That question is discussed by this Court in the case of *Southern California Telephone Company v. Hopkins,* 13 F. (2d) 814 and 815, and in *Hopkins v. Southern California Telephone Company,* 275 U.S. 393, which affirmed this Court. The Supreme Court there said:

> "In no permitted proceeding at law could interest upon payment be recovered for the time necessary to obtain judgments. * * * We find no clear, adequate remedy at law. The equity proceeding was permissible".

See, also:

Educational Film Corp. v. Ward, 282 U.S. 379.

Appellant sites a number of authorities in his brief, typical of which is the case of *Mathews v.*

Rogers, 284 U.S. 521. In that case, equitable jurisdiction was denied, not upon a state of facts similar to that existing here, but on the ground that the law of Mississippi, which was involved, provided for an adequate plain and complete remedy at law.

It is true that in our complaints we alleged, as appellant states in his brief, that the Territory was insolvent and would be unable to refund taxes paid under protest in any event. However, when it came to the time of trial, it appearing that the Territory was quite solvent and that it has been so ever since, we attempted to introduce no proof on that point and abandoned it at the trial.

2. **Plaintiffs would suffer irreparable injury unless the defendant were enjoined.**

It follows from what has been said under the preceding paragraphs that the plaintiff and intervenor would suffer irreparable injury under the circumstances alleged and proved, unless a court of equity interposed and issued an injunction. The taxes were not paid, and if they had been paid under protest we would have had no remedy at law. If not paid and the injunction were not issued, the tax commissioner, as admitted in the pleadings, would have proceeded against the property of plaintiff and intervenor to enforce the lien provided by the law. Plaintiff and intervenor had one of two courses open to them. First, to pay the tax and submit to an invalid law, which would result in irreparable injury, or, second, refuse to pay the tax and suffer the loss of their

property, and the penalties provided. Either of these courses would have resulted in irreparable injury.

The imposition of the Alaska property tax upon plaintiff and intervenor, places a lien upon their property and subjects them to certain penalties for non-payment of the tax, and if they do not pay the tax assessed their property is subject to foreclosure of tax lien and sale, without any provision for redemption. So far as property outside of municipalities and school districts is concerned, the law makes no provision for contesting the validity of the tax in any court.

The law is wholly lacking in the ordinary provisions for taking such cases before a board of equalization and then appealing in an orderly manner to a court of law. In such cases, the jurisdiction of a court of equity is properly invoked.

Gibbs v. Buck, 307 U.S. 66;

Wagner Electric Corporation v. Hydraulic Brake Co., 257 N.W. 884;

Winslow v. Fleischner, 223 P., p. 922.

Smith v. Shibeck, 24 At. (2d) p. 795;

Westmoreland Coal Co. v. Rothensies, 13 F. Supp. p. 321.

"Where a suit is not essential to the collection of a tax and no action lies to recover back the tax if paid, equity has jurisdiction to determine the legality of the tax, and enjoin the collection if illegal."

Pacific Export Co. v. Seibert, 44 Fed. 310: Affirmed 142 U.S. 339.

3. **The levy of this tax creates a lien on the property of plaintiff and intervenor which constitutes a cloud on the title of their real property.**

The lien attaches from the date of assessment and it is a first and paramount lien and is not affected by any sale or transfer of the property. (Sec. 34, Alaska Property Tax Act.) If the tax is invalid, surely the lien is a cloud on the title which cannot be removed except in a court of equity.

We can agree with appellant that if a remedy at law is available, no action in equity will lie to remove the cloud of a tax lien. We think, however, that it clearly appears there is no remedy at law. It is argued that it is not reasonable to assume the attorney general and treasurer will refuse to approve a voucher if it should be issued by the tax commissioner to refund taxes paid under protest, and it is not reasonable to assume that a local Court would not allow the recovery of interest on such refund, notwithstanding the absence in the statute of a provision for any such recovery. One is not obliged to speculate and assume that any official will do something which the law does not require him to do; and the Courts must take the law as it is written and not as it should be. Such statutes as Sec. 48-7-1(a) ACLA certainly do not afford that "plain, adequate and complete" remedy which the Courts have uniformly held necessary as a ground for denying equitable relief.

> "A suit in equity may be maintained by an owner of tracts of timber lands, where a cloud is

> cast on the title by the attempt of the Board of Supervisors to assess and collect an invalid tax, unless there is a plain, adequate and complete remedy at law, and if it be doubtful whether there is an adequate remedy at law, the court of equity will take cognizance."
>
> *Gammill Lumber Co. v. Board of Supervisors,* 274 Fed. 630 (Nev.)

This Court has held in *King County, Wash. v. Nor. Pac. Ry. Co.,* 196 F. 323, that:

> "A court of equity has jurisdiction of a suit to enjoin the collection of a tax where it is alleged that the tax is illegal and throws a cloud on the title of real property, and its enforcement will produce irreparable injury."

although in that particular case, it appeared that the tax was valid. See also, *Port Angeles Western R. Co. v. Clallam County,* 20 F. (2d) 202, decided by a three judge Court in Washington.

4. **Equity jurisdiction was necessary to prevent a multiplicity of suits.**

Since plaintiff has property in three taxing units or districts, namely the city of Fairbanks, the Fairbanks school district, and in the Territory outside those districts; and the intervenor has property in five taxing units, namely, the cities of Juneau and Douglas, the Juneau Independent School District and the Douglas Independent School District, and in the Territory outside those districts, and different methods are provided in the law for the assessment, collec-

tion and enforcement of the tax in each one of those different taxing units or districts, which methods are not by any means uniform, different suits are necessary and wholly different procedure required to contest the validity of the law. In the several municipalities and school districts, delinquent tax rolls are filed in the Courts, notices are published, and the taxpayer may come into the Court and contest the tax. The dates of these proceedings vary with the different ordinances. If the taxpayer gets no relief through the Court and does not pay the tax, the property is sold, but he has a two-year period of redemption. Separate Court proceedings would be necessary in each city and school district where the taxpayer owns property.

In the Territory outside cities and school districts, a wholly different procedure is set up in the tax law, which gives the taxpayer a right to appear in Court only when the Territory undertakes the foreclosure of a lien on his property. He is powerless to move in the matter at all except through the invocation of the aid of equity. The Territory may move when it pleases, and in the meantime there is a cloud on the title of his property. And if the lien is foreclosed, there is no equity of redemption. Surely a multiplicity of suits would be necessary for both plaintiff and intervenor.

Confronted with such a situation, equity should afford relief.

Lee v. Bickell, 292 U.S. 415;

So. Cal. Telephone Co. v. Hopkins, 13 F. (2d) 814-815;
Davis Mfg. Co. v. Los Angeles, 189 U.S. 207;
Davis v. Forrestal, 144 N.W. 423.

The fact that the municipalities and school districts involved in this action did not assess or collect the Territorial tax in 1949, and that plaintiff and intervenor paid their city and school district taxes that year, would not seem to affect this ground of their complaints, for the law continues in the statutes and the threat of its attempted enforcement in the future by the cities and school districts, with all its imperfections, infirmities, inconsistencies, and lack of uniformity, remains; and to even attempt to test it in any other manner than by injunction would involve three suits on the part of plaintiff and five on behalf of intervenor.

IV. OTHER DEFECTS WHICH WERE ALLEGED IN APPELLANT'S COMPLAINTS AND WHICH ARE APPARENT ON THE FACE OF THE LAW.

In addition to the points raised in the appellant's brief, there are two other questions arising on this appeal relating to matters appearing on the face of the Alaska Property Tax Act and in the pleadings and evidence which we think should be discussed. We understand it to be the rule that such points should be raised and discussed where they tend to support the trial Court's decision, and that this Court will hear argument on anything which sustains the lower

Court's judgment. These two questions are: (1) Absence of any Territorial board of equalization; and (2) invalidity of the tax on boats and vessels.

(1) **The District Court, in its opinion, said that the lack of a Board of Equalization would not in itself show a lack of uniformity in the tax imposed by Chapter 10. (R. 52-53.)**

It may be true that the lack of a board of equalization may not of itself show a lack of uniformity in the tax assessed for it might be within the realm of possibility that all of the several independent assessors in the numerous taxing units or districts, consisting of the municipalities, school and public utility districts and the Territory outside those districts, in some miraculous way would value all property subject to the law on exactly the same basis; but how could a taxpayer, in the absence of a Territorial equalization board, determine whether the tax levied is uniformly assessed? Plaintiff and intervenor are entitled to uniformity in the law. If the law deprives them of any method of determining uniformity, it would seem to strike at the root of their rights. The lack of such a board deprives them of their rights in that respect.

The law provides for four divisional boards, one in each judicial division, and none of these boards has any jurisdiction over property situated in municipalities, school and public utility districts. It also provides for four assessors, one in each division, to assess the property outside municipalities, school and public utility districts. They have no connection with each other. If plaintiff, for instance, has a Diesel

engine outside the City of Fairbanks and outside the Fairbanks school district, the Territorial assessor may value it at $5,000.00, while an exactly similar engine situated within the City of Fairbanks may be valued at $1,000.00 by the municipal assessor; or one piece of property might be valued at one sum in one judicial division, and at an entirely different sum in another judicial division. That would hardly be uniform; but the plaintiff has nowhere to go to seek equalization. Such a law makes uniformity impossible. It forces a taxpayer in one taxing unit to submit to the valuations made by the assessor for that unit or district, without regard to even their approximate uniformity with values in other taxing units. It deprives the taxpayer of the ordinary and necessary remedy at law to which he is entitled. It is well settled that every taxpayer has a right to complain and to seek redress through a properly constituted board or in the Courts if his property is over-valued by the assessor. The Legislature has provided for a measure of uniformity within each separate city and school district and within each separate judicial division outside cities and school districts, but the Legislature has only such power as is granted to it by the Organic Act, and nowhere in the Act is there any authority for attempting any form of uniformity except on a Territorial-wide basis. Territorial equalization is necessary to gain uniformity.

In *Railroad & Telephone Co. v. Board of Equalizers,* 85 F. 302, it is held that where assessments are made by different boards, and where there is a consti-

tutional requirement of uniformity in taxation, the State is required to provide for equalization of assessments made by different boards in order to insure that the same measures of value shall be applied to all property. On this point the Court said:

> "It is obvious enough that if the State adopts a system of taxation by which assessments are made through different officers, agencies or boards, the State is equally represented by every such board or agency, and, so far as substantial results are concerned, the case is just the same as if the State acted through one board only * * * If there is a discrimination against different species of property imposing an unconstitutional burden thereon, the result cannot be sustained, and this is equally so whether such a result is due to erroneous action by the board or to defect in the legislation in not requiring equalization and furnishing the means whereby this might be made real and effective."

The requirements of uniformity are generally understood to mean geographical uniformity throughout the Territory to which the tax applies. This Alaska tax must be uniformly assessed throughout Alaska. The statute must guarantee that uniformity. This statute, on its face, would deny it. In the case of *Huron-Clinton Met. Au. v. Board of Supervisors,* 8 N.W. (2d) p. 84, we find the following language:

> "What is meant by the words 'taxation by uniform rule?' And to what is the rule applied by the Constitution? * * *
>
> Taxing by uniform rule requires uniformity not only in the rate of taxation, but also uniformity

in the mode of assessment upon the taxable values. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a State tax it must be uniform all over the State; if a county, town or city tax, it must be uniform throughout the extent of the territory to which it is applicable. * * * The purpose of state equalization is to correct improper application of the true cash value rule and resulting variations in assessments as between counties."

See, also:

61 *C.J.*, *"Taxation,"* Sec. 65;
Macfty v. Tantges, 52 N.W. 858;
Redman v. Wisenheimer, 283 P. 363, 102 Cal. App. 488;
61 *C.J.*, *"Taxation,"* Sec. 922;
People v. Orvis, 133 N.E. 787;
Huidekoper v. Hadley, 177 F. 1;
United Globe Mines v. Gila County, 100 Pac. 744.

Equalization, therefore, is necessary to assure uniformity.

It might be contended that since no over-valuation of the property of either plaintiff or intervenor is involved in this case, the lack of a Territorial equalization board is immaterial. However, the lack of such a board shows the impossibility of first exhausting ad-

ministrative remedies before applying to a court of equity for relief. That impossibility arises because the usual and necessary administrative remedies are absent from the Alaska law. There is a complete denial of any method of testing and determining uniformity of valuation through administrative steps. The main issue in this case is lack of uniformity, which appears on the face of the law, and this applies both to the lack of uniformity in the tax itself within the different taxing districts or units, and the lack of any provision for assuring uniformity of assessment. Whether uniformity of assessment was attained in the four judicial divisions in 1949 is a question of fact, and that question can not possibly be determined because of a denial to taxpayers of any agency through which they might have assessments equalized.

(2) After the Alaska Property Tax, Chapter 10 of the Session Laws of 1949, was passed, and at the same session, the same Legislature passed Chapter 88, which is an amendment of Section 3 of Chapter 10 of the Alaska Property Tax Act.

Chapter 88 changes the basis of valuation on boats or vessels engaged in marine service on a commercial basis. A copy of Chapter 88 is set forth in appellant's brief at page 62. Under this amendment to the Property Tax Act, the owners of boats and vessels are given the option of paying the tax either on the basis of the value of the vessel or at $4.00 per net ton, with a minimum of $20.00 on any one boat or vessel.

The validity of this amendment was attacked in the complaint and in the complaint in intervention. The

Court below declined to pass on the validity of this amendment. See Conclusion of Law No. 1. (R. 84.) In that conclusion, the Court said it would not consider whether Chapter 88 is valid or invalid. The reason given for this action by the Court for this conclusion was that since the plaintiff had no boats or vessels and intervenor's boats and vessels had been taxed by the Juneau Independent School District and the taxes paid thereon, neither plaintiff nor intervenor was in a position to complain of the amendment.

However, while intervenor might not have been in a position to complain, the record shows that the intervenor was permitted to pay a tax on some of its vessels at the rate of $4.00 a ton, and that all owners of vessels had a similar option, while plaintiff, who owned property of a different nature, did have his property valued at its full and true value. In other words, this amendment, on its face, shows that the Legislature ignored the provisions of the Organic Act in applying the alternative tax to boats and vessels. The Organic Act provides that *all* taxes shall be uniform, and that the assessments of property shall be at its true and full value. Taxing boats on a tonnage basis is in disobedience of the mandate of the Organic Act, and it destroys the uniformity of the tax.

We think it requires the citation of no authorities in addition to those which we have hereinabove cited to sustain this point.

Again we find the requirements of uniformity ignored in subdivision (b) of Section 1 of Chapter 88.

where a minimum tax is imposed on each boat or vessel of $20.00 per annum. That does not apply to the tonnage tax alone, but to the whole tax levied by Section 3 of Chapter 10, and therefore a boat valued at $1,000.00, having a registered net tonnage of 2 tons, would pay not 10 mills, but 20 mills.

CONCLUSION.

Appellant bases his argument on the proposition that legislatures have been allowed broad powers of classification of property for purposes of taxation, that the Legislature of Alaska in enacting Chapter 10, Session Laws of 1949, with its two different systems of taxation, one of which we contend amounts to wholesale exemption of most of the taxable property in the Territory, was merely exercising the right of classification; that this so-called classification has a reasonable basis; and that equity has no jurisdiction to enjoin the enforcement of the tax.

We shall not attempt to analyze the list of cases cited in appellant's brief, but will agree that broad powers of classification may be exercised in taxing property; that equity will not avail if there is a plain, adequate and complete remedy at law; that it may not be invoked to remove a cloud on the title of property where a remedy at law exists.

Typical of the cases cited by appellant in support of the power of classification is *Madden v. Kentucky,*

309 U.S. 83; but as we have pointed out hereinabove, that case does not involve geographical classification of property within the confines of a state. It is apparent that the classification there was based on difficulty in discovering the property and in collecting the tax. It did not arise under any constitutional provision requiring that all taxes shall be uniform and based on true and full value.

The case of *Mathews v. Rogers,* 284 U.S. p. 581, is typical of cases cited in support of the claim that equity will not enjoin where there is a plain, adequate and complete remedy at law. This is granted; but in that case there was a remedy at law.

The case of *Shaffer v. Carter,* 252 U.S. 37, and others cited on the subject of equitable jurisdiction in the removal of a cloud on title created by an invalid taxing statute, go only to hold that equity will not intervene where there is a legal remedy. This is also granted.

The case of *Royster Guano Co. v. Virginia,* 253 U.S. 412, cited by appellant at pages 9 and 27 of his brief, does not seem to support him on any ground, and it illustrates what we have said. In that case the legislature of Virginia sought to impose an income tax, whether on business done within or without the state, on all corporations doing business in the state. Another statute exempted from taxation all corporations organized or incorporated in the state, but which transacted no business in the state except the hold-

ing of stockholders' meetings, etc. The appellant resisted the attempted collection of the tax on its income earned outside the state. The Courts of Virginia held the tax to be valid, but the U. S. Supreme Court reversed and remanded the case. The Court stated that while there is a wide latitude of discretion allowed in classification of property, and in granting total or partial exemptions on grounds of policy,

> "nevertheless a discriminatory tax law cannot be sustained against the complaint of the party aggrieved if the classification appear to be altogether illusory. * * * It is obvious that the ground of difference on which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect."

The trial Court held the Alaska Property Tax Act invalid except as to the amendment contained in Chapter 88, Session Laws of 1949, which portion of the Act the Court held was not involved in this case. Although we think and urge upon the Court that Chapter 88 could not stand alone after the sections which it purported to amend have been declared invalid, and that it also is contrary to the provisions of the Alaska Organic Act.

We submit that every defect we have mentioned hereinabove appears in the law and on the record made, and the District Court was right in holding the

law to be invalid. The injunction issued against the appellant was amply justified.

Dated, Juneau, Alaska,
January 3, 1951.

Respectfully submitted,

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